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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.945 OF 2007

IN

FIRST APPEAL NO. 1583 OF 1996

Motichandra Raghunath Ahir @ Yadav. ...Applicant.

Vs.

Radhabai Krishna Sawant & Anr. ...Respondents.

Mr. S.W.Kulkarni for the applicant.

Ms. V.R.Kalekar for respondent No.1.

CORAM : ANOOP V. MOHTA,J.

DATED : 18th September, 2007

P.C.

1. The applicant is the original defendant No.2, respondent No.1 is the original plaintiff, and respondent No.2 is the original defendant No.1.

2. Respondent No.1 filed short cause suit No. 5380 of 1979 in the Bombay City Civil Court at Bombay against respondent No.2 and the appellant for a declaration that the defendants in the said suit have no right, title and interest in respect of business known as Prince Tailor and suit premises viz. Shop No. 5 situate at Sawant House, 168, Swadeshi Mill

Road, Chunabhatti, Kurla, Bombay-400 070, and also for possession of the said premises.

3. On 11/ 21 September, 1996 the suit decreed by the learned Civil Judge, City Civil Court, Bombay. First appeal No. 1583 of 1996 filed by respondent No.2 challenges the said judgment and decree. On 4/11/1996, this Hon'ble Court, , by order dated 4th November, 1996 issued Notices and also stay the execution.

4. On 03/09/1997, First appeal dismissed for failure on the part of the appellant to serve respondent No.2 in herein, for non-removal of office objections. Civil Application No. 776 of 1998 filed by the appellant for restoration of first appeal. On 12/03/1998 the first appeal was restored. On 23/03/1998 the first appeal was admitted.

5. On 16/03/1999 Civil Application No. 6750 of 1996 filed by the Appellant for stay of decree heard and finally disposed of by this Court. This Hon'ble Court directed the appellant to pay an amount of Rs.375/- on or before 10th of every month from April, 1999 in the Bombay City Civil Court at Bombay towards compensation

for suit premises; further restrained the appellant from creating third party interest in the suit premises; further directed the Appellant to file an undertaking within three weeks from 16th March, 1999 stating therein that if he loses in the First Appeal he would hand over vacant and peaceful possession of the suit shop to Respondent No.1.

6. On 08/04/1999, the appellant filed undertaking as directed by this Hon'ble Court and also started paying the compensation as directed by this Hon'ble Court.

7. In the intervening period respondent No.1 filed the execution application No. 551 of 1999 in the Bombay City Civil Court at Bombay for execution of the decree.

8. On 08/02/2002, this court, passed a conditional order directing the Advocate for appellant to file paper book within 8 weeks from the date of passing the order. As the said order was a common conditional order and as the Advocate for the appellant missed the matter due to over sight, the aforesaid matter stood dismissed for want of prosecution.

9. On 14/10/2004, notice issued by the Registrar, Bombay City Civil Court, Bombay to the Advocate for the appellant calling upon him to show cause as to why writ of possession under Order 21 Rule, 35 of the CPC should not be issued in the suit within a week from 14th October, 2004. On 27/10/2004, reply given by appellant's advocate to the show cause notice.

10. Civil application No. 945 of 2007 filed by the appellant for restoration of the first appeal and Civil Application No. 946 of 2007 filed by the appellant for purpose of stay of the impugned decree. On 19/01/2007, the writ of possession issued. On 07/02/2007, respondent No.1 tried to execute a decree but the same could not be executed and respondent No.1 could not take forcible possession of the suit premises.

11. On 09/02/2007, the advocate for the appellant under his covering letter dated 9th February, 2007 sent copies of both the Civil Applications to respondent No.1 as and by way of service upon respondent No.1. The said envelope was returned unserved with the postal remark "always door closed".

12. On 13/02/2007, the appellant's advocate got the papers in the above-mentioned first appeal produced before this court. On 13th February, 2007 for the purpose of grant of urgent relief i.e. protection of his possession. This Court directed the advocate for appellant to serve the respondents specially respondent No.1 and the hearing of the matter was adjourned to 20th February, 2007.

13. On 20/02/2007, respondent No.1 could not be served before 20/02/2007 and was served only on 20/02/2007. This Court, was pleased to issue Rule on both the Civil Applications making the same returnable on 30/03/2007 again directing the advocate for appellant to serve the respondents and file affidavit of service. The advocate for the appellant served the advocate for respondent No.1 with the copy of order on 12/03/2007. On 26/03/2007, affidavit-in-reply filed by the advocate for respondent No.1 to the Civil Applications filed by the appellant.

14. Civil Application No. 3847 of 2007 filed by the appellant praying for permission to pay the arrears pertaining to the compensation due and payable to respondent No.1 in regard to the suit premises. On

07/08/2007, affidavit-in reply filed by the advocate for respondent no.1 to the Civil Application No. 3847 of 2007.

15. The undisputed position on record is that, this Court while passing the order on 08/02/2002, directed the appellant to file paper book within eight weeks. Though that was conditional order but that resulted into dismissal of the matter for want of prosecution. The facet that by order dated 16/03/1999 while granting the stay, this court has directed the appellant to pay amount of Rs.375/- on or before 10th of every month from April, 1999 in the Bombay City Civil Court at Bombay towards compensation for suit premises just cannot be overlooked. It means when the matter was listed in the year 2002 in view of the order referred above the applicant ought to have completed the order of stay by depositing the monthly amount. In this background it is difficult to accept the contention as raised and basically for want of material on record to justify that appellant was depositing the money even in the trial Court as directed. The obligation of such nature itself means requirement of due diligence by all sides the appellants as well as the advocates. The fact remains

that the appellant has been in possession without making the said payment.

16. When the notice received by the applicant in the year 2004 under Order 21 Rule 35 of C.P.C., the appellants moved this application for restoration. There is nothing to justify on record that since 1999 to 2004, the applicant was under bonafide mistake that the matter in question still pending in the High Court.

17. The fact remains that on the basis of another application, this court has further stayed the execution proceedings. The applicant has been enjoying the said possession of the suit premises and they are also making the said payment.

18. The learned counsel appearing for the appellant has strongly relied on

1. **Miss Priya Vs. S.Gurcharan Singh, 2000 A.I.H.C. 2608 (Jammu & Kashmir High Court).**

2. **R. Muthammal Vs. R.Thangavel, 2000 A.I.H.C.**

2609 (Madras High Court).

3. Sangramappa S/o Sambhoji Vs. Shankarappa S/o. Kanteppa Biradar, 2001 A.I.H.C., 484 (Karnataka High Court).

4. V.K.Shivananda S/o Virupakshappa Vs. The Regional Transport Officer, Davangere, 2001, A.I.H.C. 485 (Karnataka High Court)

5. U.P.State Road Transport Corporation Vs. Kedar Singh, AIR 1991, Allahabad 317.

6. Shenectady Herdilla Ltd. Vs. Banibai Dhondu Sutar, 2005(4) ALL MR 278.

7. Madhya Pradesh Industrial Development Corpn. Vs. The Mumbai District Central Co-Op. Bank Ltd. 2005(4) ALL MR 281.

8. Pratapchand Lakhamaji Jain Vs. Smt. Lilabai Krishanath Surve, 1998(4) ALL MR 426.

9. Oil & Natural Gas Commission now called Oil & Natural Gas Corporation Ltd. Vs. McDermott

International INC., 1998 (4) ALL MR 430.

. Above cases have been relied upon to support his case that for fault of the lawyer or advocate, the litigant should not suffer and in such cases the delay need to be condoned.

19. In **Sangramappa (Supra),** there was delay of 809 days and the applicant was of 70 years of age. In **U.P. State Road Transport Corporation, (Supra)** the mistake of counsel or his office though taken note of but delay was nominal. In **Shenectady Herdilla Ltd. Vs. Banibai (Supra)** the Division Bench of this Court has condoned the delay of four years and one month in filing the appeal. That was the land acquisition proceeding.

20. The reliance on Apex Court decision in **Mata Din Vs. A. Narayanan, AIR 1970 SC 1953** is of also no assistance. In that case mistake was committed by the lawyer, and filed the suit in the wrong court. There was no error on counsel part or malafide motivated as recorded in the said judgment and the delay was also

accordingly considered while observing "mistake of counsel" will not in every case sufficient ground to condone the delay.

21. To condoned the delay, the court needs to exercise its discretion. The Discretion should be exercised only after considering the facts and circumstances of each case. While exercising the discretion the Court cannot condone the delay on the sympathetic grounds. The satisfactory requirement on record is a must. (**D.Gopinathan Pillai Vs. State of Kerala 2007 AIR SCW Kerala 4713)**

22. In the present case also nothing has been shown to demonstrate basically the conduct as recorded above of not filing the deposit receipts of the arrears though ordered in the year 1999. Mere averments of regular deposit without filing any receipt or any material on record cannot be equated with all principle of "Sufficient ground" to condone the delay. The Court would definitely need to consider the facts and material placed on record and or at this undisputed position, the judgments, therefore, as cited by the learned counsel appearing for the appellants in support of this application of

condonation of delay on the foundation of so called mistakes committed by the counsel and or its clerk and or bonafide mistakes of the applicant, in the facts and circumstances of the case, and for want of material, is unacceptable.

23. Resultantly, the civil application is rejected.

(ANOOP V. MOHTA, J.)